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Federal Communications Commission
Office of Secretary

Alliance for Public Technology

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February 18, 1998

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of The 1996 Telecommunications Act

Dear Ms. Salas:

Please find enclosed an original of the above-referenced submission. Copies of the filing have also been delivered to Chairman Kennard and each of the Commissioners. In addition, I have enclosed a copy of the petition on a 3.5" diskette in an IBM compatible format using WordPerfect 5.1 for Windows in "read only" mode.

You may reach me at (202)408-0831 if you have any questions. Thank you for your assistance.

Sincerely,

Maureen A. Lewis
General Counsel

Enclosures

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FEB 18 1998

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20445

Petition of the Alliance for Public Technology	)
Requesting Issuance of Notice of Inquiry And	)
Notice of Proposed Rulemaking to Implement	)
Section 706 of The 1996 Telecommunications Act	)

To: The Commission

Petition of the Alliance for Public Technology

Maureen Lewis
General Counsel
Barbara O'Connor
Chair
Donald Vial
Chair, Policy Committee
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February 18, 1998

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Before the
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Washington, DC 20445

PETITION OF THE ALLIANCE FOR PUBLIC TECHNOLOGY REQUESTING ISSUANCE OF NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULEMAKING TO IMPLEMENT SECTION 706 OF THE 1996 TELECOMMUNICATIONS ACT

INTRODUCTION AND SUMMARY

The Alliance for Public Technology ("APT") respectfully requests that the Commission issue a notice of inquiry ("NOI") and a notice of proposed rulemaking ("NPRM") to implement Section 706 of the Telecommunications Act of 1996 ("the 1996 Act"). APT's goal of advanced universal service to improve the quality of life for all compels us to seek prompt Commission action to realize the promise of Section 706. Indeed, subsection (a) of Section 706 mandates that the Commission and each state telecommunications commission

> encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Codified at 47 USC Section 157 note ("Section 706"). (The full text of Section 706 is attached as Appendix A).

The filing consists of three sections. First, we set forth the pertinent background (Part I). Second, we make specific recommendations to remove barriers to infrastructure

investment for advanced telecommunications capabilities (Part II). Third, we recommend some pro-active means to encourage investments to build the "last mile" of high capacity capability to the home. We focus particularly on areas "marginalized" in the normal operation of markets (Part III).

Our recommendations come in large part from a forum that APT convened on July 1, 1997 for regulators, Commission and Congressional staff, telecommunications industry members and academicians. The group gathered to consider ways that the Commission and state regulators could promote infrastructure investment under Section 706 most effectively to achieve ubiquitous advanced telecommunications service.

The Commission has been remiss in implementing Section 706 of the 1996 Act, which calls for regulatory action to accelerate the deployment of advanced telecommunications capabilities. It should now move promptly to issue a Notice of Inquiry and a Notice of Proposed Rulemaking.

We urge the Commission to open a proceeding to adopt policies that remove barriers to such deployment and actively promote infrastructure investment. Specifically, APT strongly recommends that the Commission eliminate barriers to deployment by: (1) applying the Section 251(c) regulatory regime only to the existing ILEC network and not to new advanced capabilities like ADSL or HFC; (2) phasing out the UNE/TELRIC scheme over a reasonable period of time, especially as to switches, which many competitive vendors currently sell; (3) eliminating certain depreciation regulation; (4) dealing with the embedded (stranded) cost problem in an open and accountable manner; (5) engaging in a negotiated rulemaking to fashion an ISP access charge that is reasonable and acceptable to the Internet industry, yet will end the "free ride" and give

incentives to build the new high-capacity, packet-switched networks needed; and (6) instituting appropriate pricing reform, pricing flexibility, and retail price deregulation in specified circumstances.

Second, the Commission should adopt policies that promote infrastructure investment for advanced capabilities by: (7) adjusting the productivity index (e.g., targeted to the supplemental 0.5%) to accelerate such investment on the basis of a clear and convincing showing by the ILEC (this follows the precedent in the cable area); (8) attaching appropriate conditions to promote the objectives of Section 706 whenever the Commission approves a merger; and (9) establishing a federal/state policy framework for developing and supporting community/provider partnerships designed to aggregate effective demand for community-based applications, which establishes a "demand pull" basis for investment in advanced infrastructure to the home.

I. PERTINENT BACKGROUND

A. APT and its Goals.

APT is a nonprofit consumer advocacy group, whose members include almost 300 grassroots organizations and individuals seeking to foster public high-capacity infrastructure to every home in the nation. Since its founding in 1988, APT has worked to facilitate implementation of advanced universal service. Its goal is

> [t]o make available as far as possible, to all people of the United States, regardless of race, color, national origin, income, residence in rural or urban area, or disability, high capacity two-way communications networks capable of enabling users to originate and receive affordable and accessible high quality voice, data, graphics, video and other types of telecommunications services.

From its inception, APT has recognized the enabling power of advanced communications and information technologies as tools to improve the quality of

life and labor for everyone. The organization was active in shaping Section 706's commitment to ubiquitous deployment of advanced telecommunications capability. It also helped craft the definition in Section 706 of advanced telecommunications capability to include interactive high-capacity bandwith on a technology-neutral basis. A focus on investment incentives has supported our previous arguments for pro-active policies to implement Section 706 through key Commission decisions affecting interconnections, universal service and access/common carrier reforms. APT has urged consistently the Commission to give high priority to community-based applications of advanced technologies, in addition to targeting schools, libraries and health care facilities for discounted access to advanced technologies. Such applications, we believe, both generate effective demand for themselves and propel development of high-capacity networks to the home.

Home access to advanced technologies, for example, is necessary to enhance education at all levels, but also to overcome the many inequities that exist between home and school environments. It also enhances job placement services, continuous skills development and other life-long learning opportunities. We view interactive, high-capacity capability to the home as the linchpin for the effective use of "telemedicine" to improve health care delivery. In fact, telemedicine is now a recognized means of managing chronic and post-acute convalescence in the home at substantial cost savings to both patients and providers. Additionally, it expands the reach of allied health personnel in neighborhood health clinics, which may be the sole source of care for patients in

many underserved communities. Interactive advanced technologies can enable people with disabilities to perform functions that they otherwise are not able to perform.

APT believes that accelerated deployment of advanced telecommunications to the places where people live or congregate is the essence of the concept of "community" and "building community." It will equalize access to information and combat the emergence of a class of technologically disadvantaged Americans. The Internet provides a dramatic example of technology whose full potential millions of users cannot realize because of difficulties in the network backbone and because the off-ramps to the so-called "information superhighway" consist of dirt roads in the "final mile to the home."

Improving the quality of life for all Americans is our reason for submitting this petition. We believe that without actions along the lines proposed here, there will be substantial activity by competitors (ILECs and CLECs), which will direct their efforts largely to the business arena -- not to the local residential telecommunications arena. Following announcement of Worldcom's proposed merger with MCI, the former company's statement that it would focus on the business customer (a candid statement that WorldCom promptly retracted when its public relations impact sunk in -- see *The Washington Post*, Oct. 3, 1996 at A1) provides a recent example. In a transition in which regulation plays such an important role, the signals given by regulators are of great significance to market decisions.

The goals and principles of APT are set out in two documents: the 1993 publication titled "Connecting Each to All: A Telecommunications Platform for the Information Age, and the 1996 paper titled "Principles to Implement the Goal of Advanced Universal Service." For convenience, we have distributed copies of both papers to each Commissioner's office along with this pleading.

B. The pertinent provisions of the 1996 Act.

(1) Sections 254(b) and (c)(1).

The 1996 Act is crystal clear on the need for the Commission and state regulators to permit and promote advanced telecommunications services. Thus, Section 254(b) states that "[a]ccess to advanced telecommunications services ... should be provided in all regions of the Nation." The Act recognizes that such services do not today come within the universal service concept, but it also specifically recognizes that universal service is an "evolving" concept. Consequently, Section 254(c)(1) prescribes the following test for including new advanced telecommunications services within that concept: that they

> (A) are essential in education, public health, or safety; (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest....

The importance of the above evolutionary path is obvious. The nation confronts a "haves-have nots" problem of staggering proportions. Telecommunications is not a panacea but can make a significant contribution to reducing that problem. Thus, if the "haves" population has access to educational or health services that are essential, such services should be available also to the "have nots" segment, which otherwise would fall

further behind.[1] But to be made so widely available, using universal service support where necessary, the services must meet the above criteria, including (B) and (C). We submit that Section 706 is an important mechanism for meeting these criteria, and thus addressing the "have nots" problem.

(2) Section 706.

A three-legged stool consisting of technology, the market, and government policy, supports the above approach. The two driving forces here are 1) the extraordinarily dynamic technology and 2) market forces. Government policy, however, must keep pace with this "market driven" system by removing barriers and creating "circumstances in which the right innovation signals are given."[2] Section 706 explicitly commands the Commission and the states to provide such signals for innovation of advanced telecommunications capabilities, which subsection (c)(1) defines as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

Under Section 706, the Commission must promote such capability in a "reasonable and timely fashion" through all "regulating methods," with price cap regulation, regulatory forbearance, and measures to promote competition particularly singled out. The Commission must initiate an inquiry within 30 months to determine whether deployment of the above capability is occurring in a "reasonable and timely

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[1] See "Education and Telecommunications: Critical Issues and Resources," by Arthur Sheekey, IGI (Boston, MA 1997) at 27.

[2] See Interview with Assistant Attorney General Joel Klein, *The New York Times*, Dec. 22, 1997 at D7 (commenting on antitrust policy in the information industry).

fashion." A negative conclusion requires the Commission to take "immediate action to accelerate deployment ... by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Section 706(b).

(3) The Commission has failed to carry out the important directive of Section 706.

a) Reliance solely on the competitive facet of Section 706 is misplaced.

The Commission can assert that it has carried out Section 706 in one very important respect by encouraging competitive entry under Sections 251 and 252, especially with respect to interconnection.[3] We believe that the following statement fairly represents the Commission's position in this regard: Competitors need access to the residential customer, and "resale" (in quotes to denote wholesale resale and the UNE platform resale)[4] gives them that crucial access; over time, they will build out their own modern networks, as they do not wish to depend on the ILEC (and will want to

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[3] See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15,499 (First Report) (herein Interconnection Report or Decision); 11 FCC Rcd 19,392 (Second Report) (1996), rev'd, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), certiorari granted, Cases No. 97-826, 831, Jan. 26, 1998. The Iowa case set aside on jurisdictional grounds the FCC's pricing scheme, and also held that CLECs must combine the unbundled elements (herein UNE) rather than taking them as a bundled "platform" (herein UNE platform). Until there is definitive action by the Supreme Court, these important issues are unsettled. Since that is the case, and we are addressing this pleading to the Commission, we are proceeding on the basis of the FCC interconnection rulings. In any event, the states appear to be largely following the FCC's rulings (e.g., prices for UNE based on forward looking long run incremental costs; wholesale resale discounts between 17-25%).

[4] Wholesale resale denotes the retail price less the costs that will be avoided, and is pegged by the Commission as requiring discounts between 17-25% (and thus roughly earmarked at 20% off the retail price.) The Commission's primary vehicle has been the requirement that ILECs unbundle the elements of their local exchange (referred to as UNE) and offer to CLECs for resale at essentially discounted rates through a forward-looking pricing method based on "total element long run incremental costs" ("TELRIC").

distinguish their service from that of the ILEC), which will in turn force the ILEC to respond to this modernized competitor by investing in advanced capabilities.

We certainly agree with the emphasis of the Act and the FCC on fostering competition in the local market and indeed in all telecommunications markets.[5] But we strongly contend that attempts to implement Section 706 by focusing solely on fostering CLEC competition is mistaken policy for the following reasons:

(i) Local competition for the residential subscriber in any form (even retail price competition through "resale") will come much slower than Congress, consumers or the press anticipated. As a Commission spokesperson has pointed out, local competition is far more complex and difficult than long distance competition. It follows that the objective of the Act in Section 706 -- facilities-based competition that will spur advanced telecommunications capabilities for the residential customer -- will occur slowly. Since this is so, sole reliance on CLEC facilities-based competition to "accelerate" (the term used in Section 706) deployment of advanced capabilities on the local level is very poor policy, to say the least.[6]

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[5] Thus, the Conference Report (S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) states that the Act provides "... for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition..."

[6] The primary purpose of the current wave of mergers and acquisitions is clearly to capture larger shares of the profitable business, high-end markets. CLECs also compete less vigorously with ILECs for residential customers, particularly those with low margins. At the same time, RBOCs are building their own market power and capacity to invest through mergers and acquisitions. We are seeing sophisticated cream skimming of lucrative markets instead of a level playing field for stimulating infrastructure investments under Section 706. Both the merger activity and the FCC's mistaken policies on CLEC competition are contributing to this phenomenon. Instead of ILECs investing in network capacity upgrades, we see selective competition for business customers in their dominant markets. Their priority is sustaining business accounts and the high-end

(ii) The uncertainty stemming from the judicial process (the Iowa case, see n.3, supra) is exacerbating the delay in CLEC competition and that uncertainty will not be resolved until some time in the first six months of 1999 at the earliest. For example, the issues involving the UNE platform (e.g., availability; combined or recombined) will remain unsettled.

(iii) There is also the serious contention that the Commission's policy reflected in the Interconnection decision has markedly discouraged facilities-based competition. This contention rests on the provision of UNE at the cut-rate TELRIC rate (a discount, it is widely claimed, of about 50% off the retail price; AT&T asserts that the roughly 20% TSR discount has resulted in "unprofitable" local operations when marketing and other expenses are taken into account[7]). Many argue strongly that most CLECs will simply keep on using the ILEC's facilities at the discounted price, and will not build out their own facilities, such as a competing loop to residences. They contend that so far as facilities-based competition on a widespread basis, the Commission, in practical effect, is really in the same situation as before its Interconnection action -- just waiting for wireless to make a breakthrough sometime in the next century.

Significantly, disinterested observers share this view. Thus, Great Britain's Director of Oftel stated in a 1997 visit to the U.S. that the U.K. did not adopt the U.S. scheme, in particular UNE, because the U.K., rather than opting for very largely retail

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market. Therefore, in the absence of FCC policies to implement Section 706 pro-actively, market forces are undermining the ubiquity commitments of the provision.

[7] See *The Wall Street Journal*, Dec. 19, 1997 at A6; *Telecommunications Reports*, (Vol. 63, No. 51/52) Dec. 22, 1997 at 23: "... because...[TSR lacks]...'real economic potential ...', the 'best hope for seeing real competition in the near future' lies in the use of UNE --- '... the only practical route for broadly delivering the benefits of competition to residential

price competition, wants to promote facilities-based competition. British regulators believe that this approach will lead to a timely end to regulation of the local loop. He further noted that facilities-based competition by the cable operators was making significant inroads in the area of local competition.[8] Similarly, Canada, also committed to introducing local competition, has unbundled only a few elements -- access to telephone numbers, to directory assistance, and to local loops in high cost areas (and for five years local loops in densely populated areas).[9]

(iv) Further, CLECs such as the cable companies and Teleport have also cautioned that if the FCC proceeds in the above fashion the tsunami of retail price competition that will emerge from large "UNE resale" competitors like AT&T will thwart their own facilities-based competitive efforts. Thus, the two largest cable operators, TCI and Time-Warner, have only limited efforts in local telephony, with a spokesman for Time-Warner explaining recently:[10]

> We've got thousands of HFC telephony customers in Rochester [NY], and we are confident that the technology works well and that it is quite manageable by regular cable folks. But we are not deploying it elsewhere, because we're quite concerned with the regulatory structure around POTS. It's not a very good business right now. We're waiting for some of the uncertainty to clear up and for some of the rules to change that make facilities-based competition attractive, instead of what the FCC seems to be trying to do in driving resale-based competition.

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and most business customers within the next few years.'" (quoting John Zeglis, president, AT&T).

[8] *Telecommunications Reports*, (Vol. 63, No. 7) February 17, 1997 at 8. See also "Local Competition under the 1996 Act," Nov. 4, 1997 at 51-53 (Kellogg & Huber).

[9] *Telecommunications Reports*, (Vol. 63, No. 25) June 23, 1997 at 14.

[10] Statement of James Chiddix in *Multichannel News*, Dec. 8, 1997 at 218. See also *Telecommunications Reports*, Nov. 10, 1997 at 18 (statement of James Allen, Chief Executive Officer, Brooks Fiber Properties, Inc.).

(v) Finally, of greatest importance to this point, the ILECs, which have deep resources and expertise for innovation, have vigorously argued that the retail price competition of the UNE platform is discouraging their investment in advanced telecommunications capabilities. Why, they argue, should they invest in such advanced infrastructure for all Americans when they must make it available to competitors at the large "UNE resale" discounts? Why should they not invest shareholder money in areas in the U.S. (e.g., wireless) or abroad where they do not face such regulatory constraints?[11]

As to the latter and points (iii) and (iv), we do not assert that they are undisputed (as points (i) and (ii) are or should be); there may well be other factors at work. Our position is that the contentions are serious; that while only experience in the market can give a definitive answer, it is prudent and indeed common sense for the Commission to take them into account. Further, we exhort the Commission, if it is feasible to do so, to remedy the dangerous consequence that its interconnection policy, however well intentioned, is deterring facilities-based competition.

b) <u>There is therefore an urgent need for the Commission to act now to implement the directive of Section 706</u>.

The courts and knowledgeable investment experts suggest that the Commission has erred in its core policies to promote the rapid development of advanced services. Indeed, by promoting UNE resale entry (the UNE platform) and thus retail price competition, the Commission has actually created barriers to facilities-based competition. As we urged in our timely filed pleadings in the several FCC proceedings, starting with

[11] Significantly, the Commission in its Interconnection Report recognized that its policies (i.e., UNE) might deter innovation in areas like AIN (advanced intelligence networking). So also, the Commission's former Chief Economist, Dr. Joseph Farrell, raised the issue in his March, 1997 paper, Competition, Innovation, and Deregulation.

the Interconnection matter, the directive of Section 706 applies to all FCC processes -- interconnection, price caps, forbearance, universal service, access, etc. The Commission, however, has acted as if Section 706 is a matter it should consider in some separate proceeding, and in all likelihood, 30 months after the enactment date of the 1996 amendments.

Thus, in spite of our assertion of Section 706's overarching applicability, the Commission, in its most important decision implementing the Act -- the Interconnection Report (n.3) -- did not deal with the provision until the very end, and then simply "punted," saying that it would institute a separate proceeding. It has never done so. In the Universal Service decision it again "punted" on the question of advanced telecommunications capabilities.[12] We are now fast approaching August 8, 1998, when Congress mandated in Section 706 that the Commission must act.

We submit that this pattern of inaction reflects very adversely on the agency. The clear thrust of Section 706 is to place the Commission's immediate focus on accelerating infrastructure investment for advanced telecommunications facilities -- not to wait 30 months, and then start an inquiry. Moreover, the provision's drafters certainly did not intend for the Commission itself to place a substantial barrier to such investment and then not consider alleviating that barrier for two years. In testimony before Congress in 1996,[13] then Chairman Reed Hundt stated: "Section 706 does not require that the Commission wait two and a half years before trying to explore ways to deliver advanced

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[12] Federal-State Joint Board on Universal Service, FCC 97-157, CC Docket No. 96-45 (rel. May 8, 1997) (Report and Order) at para. 605.

[13] Testimony of Chairman Hundt before the Senate Commerce, Science, and Transportation Committee, June 18, 1996.

telecommunications services to all America, especially including rural America... [W]e are very mindful of the urgency of this matter."

Since the Commission has to date ignored implementing Section 706 and has actually harmed its goal, we strongly urge that it act with the greatest speed to institute both a NOI and a NPRM. The latter is necessary because if the Commission issues only an NOI, it will have to start all over again with the NPRM to take any remedial or promotional action. In the circumstances of so much delay and the directive in Section 706(b) to take "immediate action to accelerate deployment," the NPRM is clearly in order.[14] It may be that as a result of the comments filed, the Commission may determine that a further notice of proposed rulemaking is appropriate or necessary on some facet. But the Commission will have prepared itself to act on all facets and to take action on some aspects, even if it finds a further notice is called for on other matters.

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[14] We note that Bell Atlantic filed on January 26, 1998, a petition requesting relief under Section 706. APT applauds the carrier's willingness to use Section 706 to facilitate its deployment of high-speed data services and encourages other companies to consider adopting a similarly creative approach. Consistent with the prompt action that Section 706 requires, we hope that the Commission, as a result of APT's petition for a NOI and NPRM, will not delay action on Bell Atlantic's petition or any other that it might receive. Indeed, it would be consistent with the intent of Section 706 for the Commission routinely to move all matters related to that provision to the head of the appropriate dockets.

II. APT URGES THE COMMISSION TO CONSIDER THE FOLLOWING COURSES OF ACTION TO REMOVE BARRIERS TO ADVANCED TELECOMMUNICATIONS INFRASTRUCTURE INVESTMENT, WHICH WOULD MARKEDLY PROMOTE THE GOAL OF SECTION 706.

A. Applying the 251(c) regime only to the existing ILEC network.

We have shown that the requirement that ILECs provide competitors discounted access to advanced telecommunications facilities under the UNE platform scheme is problematic and has created a substantial disincentive to their investment. In addition, the policy provides them a significant incentive to invest in unregulated areas, here and abroad. Therefore, we urge that the Commission act now to remove that substantial barrier to infrastructure investment by making the UNE (and wholesale TSR) requirements applicable only to the existing network (e.g., as of August 8, 1996) and not to future advanced capabilities. We submit that Section 706, which directs the Commission immediately to remove barriers to timely deployment of advanced capabilities, demands such action.

There is a clear upside from removing what may well be a barrier. Further, it is an important step in leveling the playing field between cable and telco in the provision of high-speed access to the Internet. Cable is embarking on an extensive program to upgrade its systems to provide, inter alia, high-speed modem access to the Internet (up to 10 Mbs.). Several telcos such as Bell Atlantic are interested in developing ADSL[15] to permit much improved Internet modem connections (one to six Mbs.). The cable industry claims, without challenge, that its modem service is not a telecommunications

[15] Asymmetric Digital Subscriber Line. DSL uses advanced electronics at either end of the line to upgrade ordinary copper wire to carry voice, data and video at high speeds.

service, but rather a cable service.[16] Accordingly, it need not interconnect or permit any resale of its modem service under Section 251(a), much less offer it at UNE or TSR discounts under 251(c). But current regulations subject the ILEC to such discounts. It is most desirable that cable and telephone companies go all out in providing improved access to the Internet -- yet the Commission clearly is imposing a roadblock to the telephone companies' ability to provide such access.

There is no downside to the Commission proceeding in this fashion. CLECs' need for access to ILEC facilities has never been shown to be based on access to future advanced telecommunications capabilities such as HFC or ADSL but rather to the existing network.[17]

Indeed, this is a win-win situation for incenting infrastructure development (it being understood that readily exploitable effective demand will drive investments for advanced networks like DSL and other high speed networks). Limiting the UNE platform requirements to the existing network will free the ILECs to develop advanced capabilities like DSL or HFC (or some new vertical service) without the burden of offering them to rivals under the 251(c) scheme. The CLECs, in turn, will have a strong incentive to develop advanced capabilities in order to meet or trump any such ILEC

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[16] Clearly any program or other service bundled with the modem access is not a telecommunications service, just as any such service bundled with the telco high-speed access would be a wholly unregulated information service rather than a telecommunications service.

[17] If some element of an integrated advanced telecommunications network replaces an essential element of the network system, that element should continue to be made available under Section 251(c) on the existing basis. Indeed, the Commission should stress that it would not tolerate and would deal severely with any effort by the ILEC to cut off or otherwise undermine an existing CLEC operation based on UNE or resale because of the emergence of some new advanced ILEC element. We further point out that any such effort would quickly become apparent.

efforts -- e.g., by developing their own advanced broadband services (or vertical services). In fact, it is possible for a CLEC to provide the ADSL service by adding electronics off the switch that can be attached to the loops and other elements rented by the CLEC as unbundled elements.[18] This possibility could spur rapid provision of DSL by an ILEC, which might have hung back through a desire to preserve high T-1 charges as long as possible.

The Commission should explore the possibility of requiring that the ILEC use a separate subsidiary as a marketing device for its advanced telecommunications operations like ADSL or HFC. Such subsidiary would not be subject to rate regulation because of its lack of market power. This approach would help guard against anti-competitive activity since relations between the subsidiary and the parent ILEC would be open to full scrutiny, thus assuring treatment parity for other CLECs.

As to the lawfulness of the action proposed here, analysis establishes that the Commission must be able to forbear to remove barriers to investment in advanced telecommunications capabilities or the congressional purpose in Section 706 will be thwarted. Clearly, the Commission could not now forbear implementation of Section 251(c) with respect to the existing network (and thus the provision of voice and low speed data to residences). Indeed, none of the requirements justifying forbearance under

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[18] Some technical problems have arisen in this connection. However, representatives of ILECs (e.g., Ameritech and Bell Atlantic) have informally indicated that the use of "dry copper" for ADSL by CLECs is feasible. Further, California regulators have required, and PacTel has allowed, access to the unbundled loop for DSL. See *Multichannel News*, November 17, 1997 at 52.

Section 401(a)(10)(a) of Title I of the Communications Act would now be met as to the existing network.[19]

However, with respect to the advanced capabilities such as referred to in Section 706, the situation is entirely different. The ILEC has no such present advanced infrastructure deployed to residences. Thus, if it were to undertake HFC or similar construction to provide video and high-speed data services to residences, it would be starting from zero, with cable television by far the dominant provider. Similarly, with respect to ADSL, the ILEC has no present dominance in providing high-speed access to the Internet (and as noted, CLECs can provide this service with access to "dry copper"). In these circumstances, the forbearance requirements of 401(a) are readily met today as to these advanced capabilities.

But if a court held that the Commission cannot today forbear regulating these capabilities because of the continuing need to implement Section 251(c) for the existing network and all advanced additions thereto, the result would be to negate Section 706 and its vital purpose. That purpose is to accelerate delivery of advanced telecommunications capabilities by removing barriers to investment, including specifically through forbearance. Congress directed the Commission to take immediate action to remove such barriers. If, as we have shown, the applicability of Section 251(c) constitutes such a barrier to investment in advanced capabilities -- and is wholly unnecessary because of the absence of market power -- the Commission must be able to act now to remove the barrier. Stated differently, the two sections must be read in pari materia, and when so

[19] The Commission must determine that the enforcement of the regulation is not necessary to ensure just charges or against unreasonable discrimination or for the protection of consumers, and that forbearance is consistent with the public interest.

read, permit and compel Commission action: implementation of Section 251(c) as to the existing network, and Section 706 as to advanced capabilities.[20]

B. Phase out the UNE/TELRIC regime over a reasonable time period.

There is now no end in sight to the UNE/TELRIC regulatory scheme.[21] Consequently, we propose that after a specified period of time (in the case of an RBOC, x number of years after it has received Section 271 authorization in a particular state), there be a gradual phase-out of the UNE/TELRIC regulatory scheme.[22] The proposal is here advanced not on any supposition that effective competition will be in place (so that the CLECs have alternative sources for any and all elements sought). There is no way now to forecast when such competition will exist on the local level. Rather, we propose it here as a reasonable way to stimulate both the CLEC and the ILEC to invest in infrastructure: the latter would have assurance that the UNE platform would end at some fixed time, and the CLEC, with rules in place along these lines, would have to develop plans and eventually build out its own facilities.

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[20] As noted at n.11 supra, the Commission indicated in its Interconnection Report that it might well take remedial action to alleviate any stifling effects on new improvements, thus indicating its belief that it can afford relief from requirements that might burden investment in innovation. Similarly, the Commission might base relief upon appropriately balancing the two criteria in subsections 251(d)(2)(A) and (B) -- the proprietary nature of some network elements against the CLEC's need for such elements to provide the service that it seeks to enter (see Dr. Farrell's position described at n.11). We believe that there is no such need as to services like ADSL.

[21] As stated at n.3, supra, we are of course aware of the decisions of the Eighth Circuit and the district court in SBC Communications, Inc. et al. v. FCC, Civil Action No. 7-97-CV-163-X (N.D.Tx., Dec. 31, 1997). The Commission and ILECs are seeking review of these decisions so we have proceeded on the basis that the issues raised on review are not settled. Further, the Eighth Circuit has sustained the FCC rulings on UNE (with the important exception of the CLEC having to recombine the elements), and the states are generally following the FCC's guidelines on resale and forward-looking pricing.

In advancing this proposal, we would make a marked distinction between the treatment of the two most important unbundled elements -- the local loop and the switch. It is most difficult for a CLEC (other than a cable company in the same area of operation) to duplicate the loop. While the Commission should periodically review the general situation as to the loop (see Section II.C. below), we would suggest continuing the UNE/TELRIC regime with no specific cut-off or phase-out for the local loop.

The situation is entirely different for switches. Switches are now readily available from many competitive sources. Of course CLECs need time to purchase and install their switches (either through physical or virtual co-location) in the more densely populated areas where they will undoubtedly enter. But after a reasonable period of time (e.g., three, five or whatever number of years the Commission determines in the proceeding), why should not large carriers like AT&T, MCI-WorldCom, or Sprint (see Section 271(e)(1) for a possible delineation of large carriers)[23] be required to obtain their own switch? This would make a substantial contribution to facilities-based competition because with the switch, there is the strong possibility of innovation as to vertical services, advanced intelligent networking, etc. In the notice, the Commission could also explore the phase-out of other elements, such as the transport, which also may be widely available.

Alternatively, the Commission could consider simply raising the price of all the elements, say after a three-year period (following grant of Section 271 authorization), on

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[22] Dan Reingold, analyst for Merrill Lynch, raised this notion at the Twelfth Annual Aspen Institute Conference on Telecommunications Policy; participants both supported and opposed it, but reached no consensus.

a gradual annual basis for five years, until they reach a price level allowing ILEC recovery of historic costs (see n.3). Again, if the CLEC wanted to avoid such prices, it would be on notice of the need to install its own facilities, and the ILEC would know that the TELRIC pricing scheme would end at a specified time.

C. Set an appropriate sunset for the 251(c) regime.

Some observers have suggested that the detailed regulatory regime in Section 251(c) should have an appropriate sunset.[24] The Act in several provisions sets specific time periods (e.g., three years in Section 271(e)(1); March 31, 1999 for the end of cable rate regulation -- Section 623(c)(4)). Congress considered, but did not adopt, a specific time period for RBOC entry into in-region IX operation.

The FCC sunset period suggested here would stand on an entirely different footing. While the Commission has the authority to forbear enforcing Sections 251(c) and 271 only after their full implementation (see Section 401(d)), it could not now specify some future date for definite termination. That would be unlawful and would contravene the very reason for delegation to the agency -- that it can and must act on the basis of changing circumstances in this dynamic field.

Rather, the purpose of the sunset provision would be to put all interested parties on notice that the Commission will be reevaluating the need for the extraordinarily detailed and heavy regulatory scheme embodied in Section 251(c) at appropriate intervals

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[23] The Commission should consider dealing more liberally with smaller new entrants, perhaps with a proposal simply to review the overall situation at appropriate intervals after an initial five-year period.

[24] Thomas Duesterberg and Kenneth Gordon have suggested a period of five years. See "Competition and Deregulation in Telecommunications," Hudson Institute, Indianapolis, IN (1997) at 92-93. Eli Noam, however, mentioned a 10-year time period at the aforementioned Aspen Institute conference.